Before the
LIBRARIAN OF CONGRESS
Washington, D.C.

| | |
|---|---|
| In the Matter of: | Docket No. |
| DISTRIBUTION OF 1998 AND 1999 CABLE ROYALTY FUNDS | 2001-8- CARP CD 98-99 |

**PETITION OF THE MUSIC CLAIMANTS TO MODIFY THE OCTOBER 21, 2003 DETERMINATION OF THE COPYRIGHT ARBITRATION ROYALTY PANEL**

The American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and SESAC, Inc. ("SESAC") (collectively, the "Music Claimants"), in accordance with 37 C.F.R. § 251.55, hereby submit this petition to modify the Report of the Copyright Arbitration Royalty Panel to the Librarian of Congress, October 21, 2003 (the "Panel Report") in the above-captioned proceeding so as to increase the award to Music Claimants from 4.0% to 4.5% of the Basic, 3.75% and Syndex funds in both 1998 and 1999.

**PROCEDURAL BACKGROUND**

This proceeding involves the allocation and distribution of the 1998 and 1999 cable royalty funds. The Copyright Arbitration Royalty Panel ("CARP") issued the Panel Report on October 21, 2003, awarding Music Claimants 4.0% of each of the 1998 and 1999 Basic, 3.75% and Syndex funds. Panel Report at 92.

## STANDARD OF REVIEW

Section 802(f) of the Copyright Act directs the Librarian of Congress ("Librarian") to adopt the report of the CARP "unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title." Section 802(f) also provides that the Librarian either accepts the decision of the CARP or rejects it (in whole or in part). If the Librarian rejects it, he must substitute his own determination after "full examination of the record created in the arbitration proceeding...." The term "arbitrary" in the Act invokes the same "arbitrary standard described in the Administrative Procedure Act, § 5 U.S.C. 706(2)(A)": "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See, e.g., Order, Distribution of 1990, 1991, and 1992 Cable Royalties, 61 Fed. Reg. 55653 (Oct. 28, 1996).[1]

Ultimately, this means that a CARP must present the Librarian with a rational basis for its decision, "setting forth specific findings of fact and conclusions of law." Although the Librarian is to grant the CARP a relatively wide "zone of reasonableness" in making its determination, the CARP is nonetheless required to articulate clearly the rationale for the royalty award it grants to any given claimant. Id. The award of the CARP must be based on and supported by record

[1] Review of relevant case law and numerous precedents reveals six factors or circumstances that the Librarian examines to find that a CARP acted arbitrarily. The CARP acts arbitrarily when it: (1) Relies on factors that Congress did not intend it to consider; (2) Fails to consider entirely an important aspect of the problem that it was solving; (3) Offers an explanation for its decision that runs counter to the evidence presented before it; (4) Issues a decision that is so implausible that it cannot be explained as a product of agency expertise or a difference of viewpoint; (5) Fails to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made; and (6) Takes action which entails the unexplained discrimination or disparate treatment of similarly situated parties. See Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co. 463 U.S. 29 (1983); Celcom Communications Corp. v. FCC, 789 F.2d 67 (D.C. Cir. 1986); Airmark Corp. v. FAA, 758 F.2d 685 (D.C. Cir. 1985).

evidence. The Librarian would act arbitrarily if "without explanation or adjustment he adopted an award that was not supported by any evidence or that was based on evidence which could not reasonably be interpreted to support the award." Nat'l Ass'n of Broads. v. Librarian of Congress, 146 F.3d 907, 923 (D.C. Cir. 1998).

## ARGUMENT

As a program element that runs throughout all programming, Music is and has always been recognized as unique among the claimants in cable royalty proceedings.

Because Music is not a program category, it has never been addressed by any of the allocation studies (such as Bortz or Nielsen) in this proceeding or ever presented by the other claimants to any CARP or the Copyright Royalty Tribunal ("CRT"). Instead, Music's award has been determined based upon factors relevant to music – most notably, music use. In the 1983 CRT decision (the last litigated Music award), Music's share was calculated by adjusting the previous music award to account for increased music use. Similarly, in proceedings before the "rate court" which has jurisdiction to determine music rates for broadcast television, as well as other users, rates are generally determined by comparing previously agreed rates and making adjustments for changes in music use. See United States v. Am Soc'y of Composers, Authors & Publishers (Application of Capital Cities/ABC, Inc.), 831 F. Supp. 137, 145-6, 156, 162 (S.D.N.Y.) ("Capital Cities/ABC, Inc."). Thus, in accordance with the precedent for determining Music's share, the Music Claimants presented evidence of increases in music use since 1991-92 and (in response to the CARP's request) 1983.

In the direct phase of this case, none of the other claimants presented any evidence concerning Music Claimants' allocation. For the first time on "rebuttal", the Joint Sports Claimants ("JSC") presented evidence from a single witness, Dr. George Schink, who presented

a new methodology for determining Music's share that, JSC asserted, suggested that Music Claimants' allocation should be between 1.49% and 2.33% of the fund, a level far below the award Music Claimants have received since the inception of the cable compulsory license in 1978. See Music Claimants' Proposed Findings of Fact and Conclusions of Law ("MPFFCL") at ¶¶ 62-68, 154. No other witness presented any evidence supporting a reduction in Music Claimants' share from its previous level of 4.5%.[2]

In proposing an award no higher than 2.33%, Dr. Schink relied upon the ratio of music license fees for all broadcast television (including television Networks) to the sum of music license fees plus broadcast rights expenses for all broadcast television. Panel Report at 84. Dr. Schink's methodology was not tailored in any way to the distant signal marketplace, and it made no effort to determine the relative value of music to cable system operators. It also relied on interim music license fee data, and had no data whatsoever for 1999. Despite acknowledging these flaws, the CARP found "the Schink approach to be reasonable and worthy of some weight in determining the relative value of Music in this proceeding" and treated the 2.33% ratio "as a floor for purposes of determining Music's award." Panel Report at 87. Music Claimants respectfully disagree and assert, as set forth below, that the CARP acted arbitrarily in using Dr. Schink's methodology as evidence to reduce Music's share.

The Music Claimants recognize that the CARP did not fully adopt Dr. Schink's conclusions, and indeed drastically discounted Dr. Schink's conclusions. The CARP identified fundamental concerns with the reliability of Dr. Schink's proposal, and observed that Dr. Schink's methodology is not time tested and that its adoption would result in cutting Music

[2] PTV presented rebuttal testimony from John Wilson that addressed the possible differential allocation of Music's share among the other claimant groups, but did not present evidence useful for determining what Music's total award should be.

Claimants' historical share by nearly half. Panel Report at 88. In addition, the CARP recognized that "the Schink methodology was presented for the first time during the rebuttal phase . . . thereby constraining Music's opportunity to present rebuttal witnesses and to adduce substantive (rather than impeachment) evidence." Id. However, in the final analysis, the CARP did not go far enough. The serious flaws in the execution of Dr. Schink's analysis preclude any reliance on Dr. Schink to reduce Music's share below 4.5%. Rather than merely discounting Dr. Schink's testimony, the CARP acted arbitrarily in using Dr. Schink's proposal as a boundary for determining Music's share.

The CARP also erred fundamentally in its treatment of Music's evidence in this proceeding. The CARP ruled, contrary to all applicable music licensing precedent and without adequate explanation, that changes in music use were not relevant to the establishment of Music's award for 1998-99. The Music Claimants introduced a comprehensive study showing changes in music use, weighted to account for the economic importance of the primary distant signals, over the period between 1991-92 and 1998-99. The Music Claimants supplemented this showing by documenting changes in music use from 1983 for the two principal superstations, WGN and WTBS. The CARP gave insufficient weight to the testimony of ASCAP's Chief Economist, Dr. Peter Boyle, and BMI's witness, Frank Krupit, concerning the value of the study. Moreover, the CARP erred by establishing an award for Music within its "zone of reasonableness" that gave no weight to the unrebutted testimony of three Music witnesses: ASCAP's Seth Saltzman; the noted television and film critic Jeffrey Lyons; and BMI's award-winning composer, W. G. "Snuffy" Walden. All three witnesses testified that the use of music in general, and feature music in particular, had increased dramatically over the relevant period from 1983 through 1999. Not a single witness or document in the case rebutted this testimony.

## I. The CARP Erred by Using Dr. Schink's "Rebuttal" Testimony as a Basis for Calculating Music Claimants' Share.

Music Claimants contend that with regard to Dr. Schink's testimony, the CARP acted arbitrarily by relying on a study that suffered from serious methodological flaws. First, the use of Dr. Schink's formula is strikingly inconsistent with precedent: the most recent litigated Music awards (in 1980 and 1983) reflected the CRT's decision to abandon a formulaic approach based on broadcast industry ratios; instead, the 1983 CRT adjusted the prior award to account for increases in Music videos and "increased use of music in general." And, if one were to go back to the 1978 and 1979 decisions of the CRT (in which a formulaic approach was used), the ratio employed was dramatically different from the Schink formula. Dr. Schink's methodology also suffered from significant, substantive flaws that make any reliance on his testimony arbitrary. Dr. Schink failed to examine the relevant distant signal market, instead using Census Data that covered the entire broadcast television industry, including non-compensable Network (i.e., ABC, NBC, and CBS) programming. MPFFCL at ¶ 156-162. Moreover, the calculation was based in part on interim music license fees that do not reliably reflect the market value of music in the relevant years. MPFFCL at ¶ 207. Finally, Dr. Schink only used data for 1998, not 1999, and therefore presented no data upon which the CARP could determine Music's 1999 share. MPFFCL at ¶ 187-188.

### A. The Inclusion of Network Data Makes Dr. Schink's Approach Completely Unreliable.

Dr. Schink did not tailor his analysis to account for the unique characteristics of the distant signal market. Instead, the 2.33% which Dr. Schink presented and the CARP used is simply the ratio of two numbers found in data collected and published by the United States Census Bureau in the 1998 Annual Survey of Communications Services (the "Census Data")

concerning the expenditures by the entire broadcast television industry (including Networks) on music license fees and broadcast rights.[3] MPFFCL at ¶ 156. The Census Data reported total dollar levels of "Music license fees" and "Broadcast rights" for the broadcast television industry as a whole, failing to separate Network and local television station expenses. MPFFCL at ¶ 157. Dr. Schink's conclusions, therefore, were based on combined expenses of the Networks and local television stations. Dr. Schink made no further effort to adjust the Census data to fit the distant signal marketplace at issue in this proceeding, a unique marketplace in which WGN generates an enormous portion of the total fees and in which Network affiliates are of minor importance.

Prior to Dr. Schink's testimony, neither Music nor any other party had ever suggested or presented an argument that music license fees should be compared to the expenses of the Networks. See, e.g., 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63026, 63,030 (Sept. 23, 1980) ("1978 Decision"); 1979 Cable Royalty Distribution Determination, 47 Fed. Reg. 9879, 9885 ("1979 Decision"). Moreover, there is no dispute that the Networks pay substantial sums for the rights to broadcast professional sports, first run television series, and first run feature films, none of which are compensable in this proceeding. 17 U.S.C. § 111(d)(3); MPFFCL at ¶ 161.

In his testimony, Dr. Schink represented that his study was based on the "general concept" that the CRT adopted in the 1978 proceeding, comparing music license fees to broadcast television expenditures. MPFFCL at ¶ 156. However, as the CARP recognized, the data relied on by Dr. Schink does not provide the information necessary to duplicate the methodology followed by the CRT in the 1978 and 1979 proceedings. Panel Report at 86-87. In

[3] After 1998, the Census Bureau changed its data collection procedures and no comparable data listing music license fees exists for the year 1999 or for any subsequent year. Schink R.T. at App. F-1.

the 1978 proceeding, the CRT examined the ratio of music license fees to the expenses of the local television stations. 1978 Decision, 45 Fed. Reg. at 63,040; 1979 Decision, 47 Fed. Reg. at 9894. The CRT examined data collected and published by the FCC, the Television Broadcast Financial Data ("FCC Data"). 1978 Decision, 45 Fed. Reg. at 63,040; 1979 Decision, 47 Fed. Reg. at 9894. The FCC Data separately listed the revenues and expenses of the Networks, the Network owned and operated VHF stations, the Network affiliates (VHF and UHF) and the independent stations (UHF and VHF). Schink App. E-1, E-3. Accordingly, it was a simple matter to exclude the Networks and examine station-only expenses. On the other hand, the CRT could readily have included Network expenses in calculating Music's share; the data was available and the calculations could have been made. Instead, the 1978 and 1979 CRT made a clear choice to use only television station data. The CRT in the 1978 and 1979 proceedings did not consider any expenses of the Networks because Network programming is not compensable under 17 U.S.C. §111(d)(3). MPFFCL at ¶ 159.

Music Claimants presented strong impeachment evidence that adding the Networks lowers the proposed allocation to Music. Specifically, Music Claimants demonstrated that Dr. Schink's inclusion of Network expenses significantly decreased the percentage of music license fees as compared to the sum of music fees and broadcast rights expenses. MPFFCL at ¶ 169; Music Claimants' Ex. 2 RX. Thus, Music Claimants showed that, if the relationship between Network and local station expenses which existed in 1980 also prevailed in 1998, the removal of Network expenses from the Census data would result in a ratio of 8.6%, rather than Dr. Schink's 2.33%. MPFFCL ¶ 170-172. In addition, the Music Claimants introduced television station data compiled by the National Association of Broadcasters in cross-examination of Dr. Schink that demonstrated a national average ratio of music license fees to program expenses of 6.9%.

MPFFCL ¶ 173-177. While it is true that the CARP acknowledged "the inclusion of network data *may* have the effect of somewhat artificially decreasing the percentage of music license fees compared to broadcast rights expenses," Panel Report at 87 (emphasis in original), it was undisputed that the inclusion of Network data has the effect of reducing Music's percentage. Absent some method to quantify this effect of the Network data on the total calculation, the CARP acted arbitrarily in finding that the Schink methodology was entitled to "some weight." Panel Report at 85.[4]

Furthermore, the use of an unweighted broadcast industry-wide ratio as a determinant of Music's share is completely inconsistent with the otherwise careful effort to tailor studies and calculations to the specific circumstances of the distant signal market. Thus, all of the other awards are based on calculations derived from data (the Bortz survey, the Rosston regression analysis, distant fees generated) that is specific to the distant signal marketplace. Only in the case of Music does the Panel use a calculation based upon undifferentiated data from the entire broadcast industry.

The CARP did not articulate why it found these departures from the 1978 and 1979 CRT's methodology acceptable. It is permissible, under appropriate circumstances, for the CARP to change an allocation if a party presents persuasive "evidence tending to show that past

---

[4] Moreover, in 1978, the CRT excluded Networks and weighted the non-Network numbers so as to make independent stations the dominant factor. Independent stations were then and are now a relatively small part of the overall broadcast market – the 2.33% tells us nothing about the level that would prevail for independent stations. Furthermore, in its calculations, the CRT also weighted the values of the different types of local stations to reflect properly their relative contributions to the royalty pool. Thus, the ratio of music license fees to local program expenses for Network affiliates was given a reduced weight because carriage of such stations generated a relatively small percentage of the royalty fund as compared to independent stations. See, e.g., 1978 Decision, 45 Fed. Reg. at 63,040. Dr. Schink made no effort to weight the data to reflect the relative contributions of different stations.

conclusions were incorrect...." NAB v. Copyright Royalty Tribunal, 772 F.2d 922, 932 (D.C. Cir. 1985). However, this CARP did not find that the 1978 and 1979 CRTs were "incorrect" for excluding Network data or for weighting the stations to place more emphasis on independents. Such a finding would be questionable because, as noted above, the CRT's approach was demonstrably superior to Dr. Schink's in reflecting the realities of the distant signal market. In light of the CARP's failure to explain adequately why, after some twenty years, it has become appropriate to use Network data to determine Music's share in a market in which Network programming is not compensable, it is clear that the use of Dr. Schink's ratio is arbitrary or capricious.

### B. The CARP Acted Arbitrarily By Ignoring the Impact of Interim Fees on Dr. Schink's Calculations.

A fundamental, underlying premise of Dr. Schink's calculations is that the music license fees reported in the Census Data were marketplace rates derived through negotiation or alternatively, in litigation in the ASCAP or BMI rate courts. However, music license fees are often paid on an interim basis that does not reflect actual market value. Interim fees are paid during a period of time while litigation in the rate court is pending; when the litigation concludes, a "true up" for the period of time must occur to apply the fees finally determined to be applicable. Thus, the interim fees do not reflect the judgment of either the parties or the court as to appropriate fee levels. Recognizing this, in the 1980 Cable Royalty Distribution Proceeding, the CRT refused to reduce Music's share based on evidence that music license fees as a percentage of program expenses had decreased because the fees in question were interim fees that dated back several years. 1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9552, 9567 (Mar. 7, 1983); MPFFCL ¶¶ 65, 207. See also Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, Final Rule and Order, Library of

Congress, Copyright Office, May 8, 1998, 63 Fed. Reg. 25394, 25403-04 (rejecting the use of "any figure which uses an interim rate"). The CRT ruling is sound: interim fees represent neither the voluntary agreement of the parties nor a final judicial determination of fair market value. In fact, interim fees are precisely not what a willing buyer would pay a willing seller – they are in place for the very reason that a buyer and a seller could not agree on a price.

Yet a significant portion of the fees used by Dr. Schink were interim. The record indicates that, at least with respect to ASCAP, the broadcast television stations were paying interim rates in 1998 and 1999, although as discussed *supra*, Dr. Schink only had Census Data for 1998. Music PFFCL at ¶ 207. Acknowledging that some of the fees were interim, the CARP explained that this did not render Dr. Schink's methodology defective because interim fees "might well *exceed* final fees." Panel Report at 87 n.58 (emphasis in original).

The Panel apparently concluded the fact that the broadcast stations were paying ASCAP fees on an interim basis in 1998 and 1999 did not undermine Dr. Schink's conclusions. The Panel reasoned that as demonstrated by the Buffalo Broadcasting[5] decision, interim fees may exceed final fees. Similarly, the Panel found that "there has been some decline in the level of Music's license fees since the Buffalo Broadcasting decision." Panel Report at 88. These findings are not only unsupported by the evidence, but are erroneous.

Dr. Boyle, ASCAP's chief economist, testified that ASCAP's local broadcast fees have not decreased. Boyle Tr. 4577. The Buffalo Broadcasting case, decided in 1994, rejected a revenue-based fee, and set final ASCAP fees for the local stations on an industry-wide dollar basis. That industry-wide fee greatly exceeded the annual fees which were being collected from

[5] United States v. American Society of Composers, Authors and Publishers, 1993 WL 60687 (S.D.N.Y. 1993) (Dolinger, M.J.), aff'd in part and vacated and remanded in part 157 F.R.D. 173 (S.D.N.Y. 1994) (Conner, J.) ("Buffalo Broadcasting").

the stations during the interim period. The Panel's reliance on Dr. Schink's misguided interpretation of Buffalo Broadcasting to find that ASCAP had been paying interim fees through 1994 that exceeded final fees and to conclude that consequently Music's 1998-1999 interim fees may similarly exceed final fees is clearly erroneous and, therefore, arbitrary. Moreover, to the extent the Panel implies that the Buffalo Broadcasting decision effectively reduced the ratio of ASCAP's local fees to total Broadcast expenses of local stations in this proceeding, as discussed above, the record fails to support such a finding.

However, regardless of the hypothetical possibility that final music fees might be higher or lower than interim fees, the use of interim as a benchmark from which to calculate Music Claimants' share in this proceeding is arbitrary and contravenes established CRT precedent.

**C. Dr. Schink Presented No 1999 Data.**

Dr. Schink's ratio for the year 1998 was based upon two numbers in The Census Bureau's 1998 Annual Survey of Communication Services. The Census Bureau did not compile or publish one of those two numbers, the Music Licensing Fee data, for 1999 or subsequent years. It is, therefore, impossible to calculate a ratio for 1999 equivalent to the 2.33% used by the CARP for 1998. Dr. Schink presented no other data upon which to determine Music's share in 1999. MPFFCL ¶ 187. As the CARP recognized, Dr. Schink apparently assumed that for purposes of calculating an allocation to Music Claimants for the years 1998 and 1999, the year 1999 would be identical to the year 1998. Panel Report at 87 n.59. However, no evidence was presented in support of this assumption and accordingly, the CARP failed to consider an important aspect of the problem that it was assigned to resolve. Giving any weight to 1998 data in 1999 is so implausible that it cannot be explained as a product of the CARP's experience.

While the CARP conceded that Dr. Schink's failure to include 1999 data rendered the "reliability of his ratio for 1999 less certain." Panel Report at 87 n.59, the CARP did not go on to explain exactly how it did calculate Music's share for 1999. In fact, the record shows that for the years 1991-1998 there was a substantial year-to-year variation in the television broadcasting industry's reported Music License Fee expenditures (e.g., a 20.4% decline from 1992 to 1993 and a 24.7% increase from 1994 to 1995). MPFFCL at ¶ 188. Thus, there was no evidence to suggest that Dr. Schink's 1998 calculation could properly be used to determine Music Claimants' 1999 share. In the absence of any evidence in 1999 and of a reasoned explanation for the calculation of Music's 1999 share, the CARP acted arbitrarily in applying Dr. Schink's 1998 data to 1999.

**D. The Schink Study Was Improperly Submitted on Rebuttal.**

The CARP also erred by relying on a new methodology that was not presented until the rebuttal case and that did not directly rebut testimony or evidence presented in any claimant's direct case.[6] The Schink testimony should have been disregarded because it was beyond the scope of proper rebuttal. MPFFCL at ¶ 153. A complete record was not developed on Dr. Schink's new methodology because JSC made a tactical decision not to present Dr. Schink in its direct case; as a result, Music could not later offer witnesses to rebut him. It also meant that the

[6] In his rebuttal testimony Dr. Schink also criticized the music use study presented by the Music claimants in their direct case. While Music Claimants do not agree with Dr. Schink's criticisms, there is no dispute that this testimony constituted proper rebuttal and that the CARP was entitled to weigh the evidence in determining whether to award Music Claimants an increased share.

CARP could not ask questions or ask for supplemental testimony as it did with respect to the direct case. In analogous circumstances, federal courts have reversed a jury's factual determination that was likely based on evidence that exceeded the proper scope of rebuttal. See, e.g., WMATA v. Two Parcels of Land, 569 F.2d 816, 817-19 (4th Cir. 1978) (finding prejudicial error due to admission into evidence of new theories presented by a "rebuttal" witness). Similarly, the Librarian should find that consideration of the Schink testimony was arbitrary and not otherwise in accordance with law and, accordingly, modify the CARP report in this instance.

## II. The CARP Acted Arbitrarily in Rejecting Evidence Of Increased Music Use on Distant Signals.

In its direct case, Music Claimants presented a music use study that analyzed the duration of music appearing in programs carried by distant signal and presented evidence that there had been an increase in music use, both from 1991-92, the time of Music's last public settlement and from 1983, the year of the last litigated proceeding in which Music Claimants participated. After considering the music use study and the criticisms of it by the other claimants, the CARP concluded that Music had failed to demonstrate a statistically significant increase in music use. Panel Report at 82. The CARP further suggested that increased music use, even if proven, is insufficient to establish increased relative value. Panel Report at 82 n.55. This finding contravenes established CRT precedent and undisputed evidence of how music license fees are determined in the marketplace.

The Panel also erred in apparently[7] failing to accord any weight to the qualitative evidence that music has become an increasingly important part of the overall television entertainment experience. The Music Claimants introduced uncontroverted evidence that since 1983 there has been a significant evolution in the use of music in movies and television programming, including more sophisticated use of background music, greater use of feature songs in series, and increasing use of embedded music videos. MPFFCL, ¶ 83-89. One measure of this phenomenon is the increase in the average number of soundtrack albums among the Billboard magazine weekly top 200 from 7.25 in 1990 to 18.15 in 1999. MPFFCL ¶ 91. This evidence, which was uncontroverted, is completely inconsistent with the Panel's decision to reduce Music's share of the funds.

The CARP's decision to disregard the Music Claimants' evidence is also inconsistent with precedent. In the 1983 Proceeding, the CRT acknowledged that "as a program element, [Music] admits of almost no possible precise formula to determine its marketplace value." 1983 Cable Royalty Distribution Proceeding, 51 Fed. Reg. 12,792, 12,793, 12,812 (Apr. 15, 1986) ("1983 Decision"). The CRT granted an increased award to Music, in part, because it found that there had also been a quantitative increase in music use, determining that there was "more use of music in general." Id.

This recognition that the value of music is, at least in significant part, determined by the density of use is consistent with the uncontradicted evidence before the CARP in this proceeding of how music license fees are set in the marketplace. ASCAP and BMI are regulated by consent decrees entered to settle antitrust claims asserted by the government many years ago. United

[7] The Panel stated that it was "unable to credit significantly" the qualitative evidence (Panel Report at 75 n.46) but did not explain whether this meant that the evidence was being given no weight whatsoever.

States v. Am. Soc'y of Composers, Authors and Publishers, No. 41-1395 (WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2001); United States v. Broad. Music, Inc., 1966 Trade Cases (CCH) ¶ 71,941 (S.D.N.Y. 1966), modified by, 1996-1 Trade Cases (CCH) ¶ 71,378 (S.D.N.Y. 1994). Under the terms of the consent decrees, BMI and ASCAP are required to provide music performance licenses to any entity that requests a license. MPFFCL at ¶ 48.

If ASCAP cannot reach agreement with a music user on the rate or fee for a performance license, a reasonable rate is determined by a United States District Judge in the Southern District of New York. BMI similarly has its own rate court in the Southern District of New York. MPFFCL at ¶ 49.

Over a series of decisions, the ASCAP rate court has established that a reasonable rate for a music performance license is determined based on various factors, including the overall amount of music used by the user, the revenues of the music user,[8] rates previously paid by that user or similar users for the purchase of comparable rights, and changes in revenues, music use or other pertinent circumstances since the last litigated or settled rate. See, e.g., United States v. Am. Soc'y of Composers, Authors & Publishers (Application of Capital Cities/ABC, Inc.), 831 F.Supp. 137, 145-6, 156, 162 (S.D.N.Y. 1993) ("Capital Cities/ABC, Inc.") (describing previous cases). Against this backdrop, music license negotiations generally focus on music use, the revenue of the user and changed circumstances from a previous negotiated rate with the same user group. MPFFCL at ¶ 53.

[8] In this proceeding, the level of revenues is determined by the size of the funds so that this factor is predetermined.

In the real-world marketplace, the rate court has adopted an approach for resolving disputes about the level of music fees in which music use is one relevant factor. The CARP acted arbitrarily in suggesting otherwise. The CRT found, in 1980, that Music's share cannot be determined by mechanically applying any particular formula. 1980 Decision, 48 Fed. Reg. at 9566. That finding is in line with the opinion of the ASCAP rate court:

> [T]he Court must admit that it remains incapable of quantifying the value of music to any particular television program. Not do we believe that the rate-setting function requires us to venture any such assessment. Surveying the fluctuations in the amount of music used by a Network over time provides an adequate proxy by which to gauge whether the significance of music to Network programming has changed relative to prior years; assuming all other factors remain constant, the direction in which a Network's music use has headed should chart the course for the music license fees owed. . . .

Capital Cities/ABC, Inc., 831 F. Supp. at 156. Music use has been a relevant factor in determining music's share in these proceedings for two decades, and Music Claimants were well justified in presenting such evidence. While it is within the CARP province to weigh the evidence, it may not ignore established precedent. Cf. 17 U.S.C. § 802(c). Accordingly, Music Claimants request that the Panels' determination be modified such that the Librarian affirms CRT and rate court precedent that music use is a significant factor in determining music's value.

The CARP also erred by arbitrarily disregarding the unrebutted testimony of three Music witnesses: ASCAP's Seth Saltzman; the noted television and film critic Jeffrey Lyons; and BMI's composer affiliate, Snuffy Walden, on the grounds that it was not "quantifiable". Given the fact that the CARP established the Music award using a "zone of reasonableness" approach, it was plain error for the CARP to ignore this unchallenged testimony of the substantial increase in use and importance of music in television programming that appears on distant signals at issue in *this* proceeding (as contrasted to Dr. Schink's study of all programming on television) on the

grounds that it was unquantified. Indeed, Music's quantitative study showing an 11% increase in usage did quantify this evidence. One of the panel's main criticisms of the Music use study was that it failed to account for differences in value of different types of music (e.g. feature, background and theme). The evidence presented by the Music Claimants' witnesses did in fact address this by pointing out the increased value of music to television programming, from people with experience within the television industries.

## CONCLUSION

The CARP acted arbitrarily in using Dr. Schink's methodology as a floor for determining the zone of reasonableness for Music Claimants' award, and no other evidence was presented upon which the CARP could infer that Music Claimants' share has declined since its last litigated award. Further, because Dr. Schink presented no evidence for 1999, the CARP failed to consider entirely an important aspect of the problem before it. Music Claimants further request the Librarian to modify the determination to the extent that the Panel Report suggests that quantitative and qualitative changes in music use may not be used as a basis for determining music's share in royalty distribution proceedings. Consequently, the determination of the CARP should be modified in both 1998 and 1999 to increase Music's share to 4.5% of the Basic, 3.75% and Syndex funds. Because the Music award is made "off the top,"[9] the shares of the participating claimant in each fund should be proportionately adjusted to account for the increases.

[9] Music Claimants agree with the Panel's decision (at pp. 89-90) not to allocate the Music award differentially among the other claimant groups.

Respectfully submitted,

Dated: November 4, 2003

**MUSIC CLAIMANTS**

**AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS**

By: _____

Joan M. McGivern
Sam Mosenkis
ASCAP
1 Lincoln Plaza
New York, NY 10023
(212) 621-6204

By: _____

I. Fred Koenigsberg
Carol Witschel
Stefan Mentzer
White & Case LLP
1155 Avenue of the Americas
New York, NY 10036-2787
(212) 819-8806

**BROADCAST MUSIC, INC.**

By: _____

Joseph J. DiMona
Judith M. Saffer
Marc D. Ostrow
Broadcast Music, Inc.
320 W. 57th Street
New York, NY 10019
(212) 830-2533

By: _____

Philip J. Mause
Michael J. Remington
Jeffrey J. Lopez
Drinker Biddle & Reath, LLP
1500 K Street, N.W.
Suite 1100
Washington, D.C. 20005-1209
(202) 842-8839

**SESAC, INC.**

By: _____

Patrick Collins,
SESAC, Inc.
55 Music Square East
Nashville, TN 37203
(615) 320-0055

By: _____

John C. Beiter
Loeb & Loeb LLP
1906 Acklen Avenue
Nashville, TN 37203
(615) 749-8300

**CERTIFICATE OF SERVICE**

I, Philip J. Mause, hereby certify that on this 4th day of November 2003, two copies of the foregoing "PETITION OF THE MUSIC CLAIMANTS TO MODIFY THE OCTOBER 21, 2003 DETERMINATION OF THE COPYRIGHT ARBITRATION ROYALTY PANEL" were served by hand delivery to the following representatives of the Phase I parties:

Gregory O. Olaniran
Michael E. Tucci
Stinson Morrison Hecker LLP
1150 18th Street, N.W., Suite 800
Washington, D.C. 20036-3826
*Counsel for Program Suppliers*

Timothy C. Hester
Ronald G. Dove, Jr.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-7566
*Counsel for Public Television Claimants*

Robert Alan Garrett
James Cooper
Ronald A. Schechter
Christopher Winters
Jule L. Sigall
Michele T. Dunlop
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206
*Joint Sports Claimants*

John I. Stewart
Karen C. Herman
Parul Desai
Valerie Hinko
Michael Lazarus
Crowell & Moring, LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
*Counsel for National Association of Broadcasters*

L. Kendall Satterfield
Richard M. Volin
Finkelstein, Thompson & Loughran
1050 30th Street, N.W.
Washington, D.C. 20007
*Counsel for Canadian Claimants Group*

Philip J. Mause